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APPENDIX

Cases Cited

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IN THE

Supreme Court of the United States

October Term 1955

No._____

CONE BROTHERS CONTRACTING COMPANY,
a Corporation,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Fifth Circuit entered in the above entitled cause June 22, 1956 (R-286) sustaining an Order of the National Labor Relations Board insofar as it required Petitioner to bargain collectively with United Stone and Allied Products Workers of America C.I.O. on the basis of a run-off election attacked by Petitioner as being held on an arbitrary, remote and discriminatory date, over protest of Petitioner, so that said election was not truly representative.

JURISDICTION

The judgment of the Court of Appeals was entered June 22, 1956 (R-286) and Order Denying Rehearing entered July 20, 1956 (R-293).

The jurisdiction of this Court is invoked under Section 1254 of the Judicial Code, being 28 USC Section 1244.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet reported, but is set forth in Appendix and in Record on Page 276.

Record References. The references in this petition are to the record and Joint Appendix as certified by the Court of Appeals.

QUESTIONS PRESENTED

The Petitioner contends that the Court of Appeals erred in upholding the Order of the National Labor Relations Board and the election and proceedings on which same was based in that said Order is invalid in the following respects:

1. Said proceedings and Order are invalid in that said Union was improperly, arbitrarily, and capriciously certified as bargaining representative of the allegedly appropriate unit as the result of an election with an arbitrary, prejudicial and improper eligibility date.

2. Said Order is invalid because evidence proffered and erroneously excluded showed that an overwhelming majority of the employees of the Petitioner in the unit

by a vote of some 406 employees to 64 employees, immediately subsequently to certification, did not desire unionization and the Union would not have prevailed at the election if a proper eligibility date had been set.

3. Said Order is arbitrary and capricious, constitutes an abuse of discretion and exceeds the powers vested in the Board.

STATEMENT OF THE CASE

Petitioner had filed with the Court of Appeals a petition for review of, and to set aside, an Order of the National Labor Relations Board, dated October 10, 1955, (R 256) which adversely affects the Petitioner. Herein the National Labor Relations Board will be referred to as the Board, the Transcript of Record as R and the Joint Appendix of Petitioner and Respondent as A.

On October 26, 1953, the United Stone & Allied Products Workers, C.I.O. filed petition for certification (R 68) and after certain proceedings (R 69-96) on March 17, 1954, an election was held, under the supervision of the Board, at the place of business of the Petitioner on the issues of the United Stone & Allied Products Workers of America, C.I.O. or the American Federation of Labor Union, being the bargaining representative of an allegedly appropriate unit or against unionization of the unit (R 96).

At said election 129 ballots were cast against unionization while 129 ballots were cast for United Stone and Allied Workers of America, CIO, and 77 ballots were cast for the American Federation of Labor (R 113, 114). This necessitated a run-off election. The Board, over

protest of the Petitioner (R 132) and over Petitioner's request for a new eligibility date for the run off election, (R 115) arbitrarily set the run-off election for April 7, 1954, using as the eligibility date for employees of the unit to vote in such election the payroll period immediately preceding March 1, 1954 (R 119, 121) which was the same eligibility date as used in the inconclusive election of March 17, 1954 (R 95) and, despite the fact that Petitioner had pointed out in its objections, that 87 employees in the unit had left the employ of the company subsequent to said payroll date, and prior to March 27, 1954, and that during the same period of time 99 new regular employees had been hired (R 115, 132). Petitioner asserted that these 99 regular employees being hired subsequent to the payroll period of February 27, 1954, were denied the right to vote in the run-off election of April 7, 1954, and, thus, were unable to designate whether or not they desired to be represented by the Union (R 132).

The election of April 7, 1954 using the early eligibility date, resulted in 196 votes for United Stone and Allied Workers of America, CIO (hereinafter called the Union) and 140 votes against the Union. (R-130)

Petitioner objected to the results of said election as a basis for the certification of the Union as bargaining representative by reason of the 99 regular employees hired subsequent to the eligibility date but prior to the date of election (R 132 and 144); however, the Union was certified by the Board as the bargaining representative on July 27, 1954. (R 148).

During early August 1954 (A 122), the Petitioner, in an effort to determine the actual desires of the employees within the unit as to representation by a Union, submitted a questionnaire on which the employee within the unit could designate whether or not he was for unionization (A 141, 142). Of the questionnaires marked by the employees, petitioner proffered that 406 of the employees indicated they did not desire unionization while only 64 employees indicated they belonged to the Union. (A 99). Thereupon, when the Representatives of the Union called upon the Petitioner and its attorneys to negotiate a union contract, the Petitioner, through its attorneys, advised that in their opinion the Union did not represent a majority of the employees within the unit, but that it appeared they represented only a small minority, and Petitioner, therefore, declined to enter into negotiations for a union contract. (A 124)

On Octobr 19, 1954, the Regional Director of the National Labor Relations Board, Tenth Region, Atlanta, Georgia, issued a complaint against Petitioner, being Board Case No. 10-CA-2066, alleging that Petitioner had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Sections 8(a) (1) (5) and Sections 2 (6) (7) of the Act. (R 156). The complaint was based upon an amended charge filed October 19, 1954 by the Union (R 155) and alleged in substance that the Petitioner is and was engaged in commerce or in operations affecting commerce, as those terms are defined by the Act, and since on or about July 27, 1954, and subsequent thereto, Petitioner refused to bargain collectively with the Union, allegedly representing a majority of Petitioner's employees in an allegedly appropriate unit as the exclusive representative of the employees in such unit. (R 156)

On or about Octobr 28, 1954, Petitioner duly served and filed its answer to the complaint denying that it was engaged in commerce or in operations affecting commerce as those terms are defined in the Act, asserting that the purported certification of the Union was improper, and that the Union was not a properly certified bargaining representative. (R 167)

Pursuant to notice, (R 184) a hearing was held on January 17 through 18, 1955, in Tampa, Florida, before a Trial Examiner designated by the Board. (R 189).

On April 27, 1955, the Trial Examiner issued an Intermediate Report and Recommended Order (R 189) in which he concluded, assuming the propriety of the certification of the Union, that Petitioner was engaged in commerce or operations affecting commerce and had engaged in certain unfair labor practices and recommended that the Board order Petitioner to cease and desist from in any manner interfering with, restraining, or coercing its employees in the exercise of their rights to self organization. He further recommended that the Board order Petitioner to bargain collectively with the Union upon request and to take certain other affirmative action. (R 189)

On April 27, 1955, the Board issued its order transferring the case to, and continuing it before the Board for decision and order. (R 239).

On or about May 6, 1955, Petitioner duly served and filed with the Board its Exceptions to the Intermediate Report and Recommended Order of the Trial Examiner, challenging the propriety and legality of certain of the Trial Examiner's findings and recommendations which were adverse to Petitioner. (R 252)

On October 10, 1955, the Respondent Board issued its Order Affirming the Intermediate Report and Recommended Order of the Trial Examiner and issued its Order requiring Petitioner to bargain collectively with the Union, to cease and desist from certain alleged unfair labor practices and to take certain other affirmative action. (R 256) Petitioner, thereupon, filed their Petition for Review of this Order and to set aside the same.

Hearing was had before the Court of Appeals on May 21, 1956 (R 275) and that Court gave its decision upholding the said election and directing Petitioner to bargain collectively with the Union on June 22, 1956, (R 276) and entered judgment thereon on said date (R 286).

REASONS FOR ALLOWANCE

It should be pointed out at the outset that all proceedings before the Board on the unfair labor charges are predicated on an assumption by the Board that the certification of the Union on July 27, 1954, was valid.

In the report of the hearing officer (R 189), he states: "As previously stated, all issues in this case are here predicated, as they must be, upon the validity of the certification issued by the Board to the Union," (R 208) and, of course, the trial examiner for the Board was bound by the decision of the Board, certifying the Union.

As recited in the statement of the case, an election held on March 17, 1954, an inconclusive result was obtained. The CIO obtained 129 ballots *as did non-unionization* with a second union running third. The Peti-

tioner then applied for a new eligibility date for the run-off election offering proof that subsequent to the eligibility date of the first election and prior to March 27, 1954, *the eligibility date requested by Petitioner* for the run-off election, 87 employees within the appropriate unit had left the employ of the company and 99 new regular employees had been hired. This request was denied by the Board, and a run-off election was set for April 7, 1954, using the *same eligibility* date of February 27, 1954, as used in the first election.

The election of April 7, 1954, resulted in 196 votes for the CIO and 140 votes against the Union (R 113, 114). The Petitioner then filed objections to the report of the election, (R 114, 132, 145) pointing out that the election was not truly representative because of the remoteness of the eligibility date, offering proof that from the old eligibility date, February 27, 1954, to the eligibility date requested by Petitioner, to-wit: March 27, 1954, 87 employees left the employ of Petitioner and 99 new regular employees were hired. Notwithstanding the showing that at least 99 regular employees were deprived of voting rights—which number was nearly twice the difference between the votes received by the Union and those against the Union—the Board overruled the objections, (R 148), denied the exceptions and certified the Union as the bargaining representative on July 27, 1954. (R 148).

Approximately two weeks later, (R 91) the Petitioner, in what the Trial Examiner found to be a desire on its part to make a tally of its own concerning the unit (R 201), passed out with its payroll to each em-

ployee in the unit involved a questionnaire on which to indicate whether or not the employee belonged to a union and which stated:

> "We are asking the above question to see whether the union represents a majority of you or not. Your truthful answer will be appreciated. It will make no difference in your employment whether you do or don't."

Evidence was proffered at the hearing to show that of the 470 questionnaires marked by the employees in the unit involved, only 64 marked the same for the Union while 406 marked the questionnaire "No," as not belonging to the CIO Union (A 99).

The trial examiner erred in refusing to allow this in evidence as it clearly showed that because of the remoteness of the eligibility date for the run-off election the Union does not and did not represent a majority of the employees in the unit.

We have digressed from the main issue of the validity of the certification of July 27, 1954, because, in our opinion, the results of the polling in August 1954 show conclusively that the certification was improper.

To reframe the basic issue, can an election be held proper where, by arbitrary action on the part of the Board, 99 employees, whose vote would have produced, or reasonably could be expected to produce, a different result, are bound by an election in which they are denied a choice?

The very foundation stone of the society in which we live is the right of voicing our beliefs by voting. This democracy is based on freedom of choice of the

electorate and we are tearing to shreds the very essence, the breath of life, of our free America, when we commence to deny, those who are bound by an election, the opportunity to express their choice.

It is submitted that the arbitrary action of the Board in setting a remote eligibility date before the run-off election, especially in the light of the large turn-over of employees, and denial of the right to vote to 99 employees shows that the election of April 7, 1954, on which the Union was certified as bargaining representative was invalid.

The position of the Board is that it has a general rule, as set forth in the trial examiners report (R 192), that "Employees who were eligible to vote in the election and who are employed in an eligible category on the date of the run-off election shall be eligible to vote in the run-off election."

By the same token, however, when an election has been postponed and the Board issues a second direction of election, it will issue a second eligibility list in order that newly hired employees will be permitted to vote. The *Pure Oil Co.* (1947) 75 NLRB 658.

In this connection, the Board has said in *Alabama Drydock & Shipbuilding Co.* (1938) 5 NLRB 149: "Our problem is to adopt a period of time which will be likely to insure eligibility to the greatest possible number of employees having a direct and substantial interest in the choice of representatives."

And in *United Air Craft Corp., Pratt & Whitney Aircraft Div.* (1953) 103 NLRB 15, when an election was set aside and a new one ordered, the payroll period was ordered by the Board changed to a more recent date to include a large number of new employees.

Further citations could be given, where the Board, contrary to the arbitrary and capricious ruling here made, directed an eligibility date closer to the election to allow the greater number of employees affected the right of choice, but these should suffice.

The Petitioner has been unable to obtain any earlier review of this discriminatory action of the Board; and could only await its day in Court in the manner in which it is now presented. As stated in *Volney Felt Mills, Inc. v. Le Bus,* 196 Fed 2d 497, 498, until that day we had to "as all others similarly situate must, wait with such fortitude and patience as it can muster."

From this, and decisions in *NLRB v. Sidran,* 181 Fed 2d 671 and *NLRB v. Huntsville Mfg. Co.,* 196 Fed 2d 430, we find that this question can be presented to the courts only in the manner in which they are now presented.

It does not take much imagination to see that the requiring of a remote eligibility date for the run-off election not only deprived 99 employees of the right to vote, but also resulted in an election out of keeping with the actual desires of the majority of the employees. Such an election cannot in good conscience be allowed to stand.

Not only is it clearly shown that the questionnaire, under the circumstances under which it was taken is not an unfair labor practice, but also the results thereof, erroneously excluded by the trial examiner, conclusively show that the run-off election was invalid in depriving 99 employees, whose votes would have substantially affected the results, of their right to vote and who obviously from the result of Petitioner's questionnaire would have resulted in non-unionization. Such election are for the purpose of fairly and impartially determining the desires of a majority of the employees. A remote eligibility date does not bring about a fair and impartial election. The unfairness of the situation and the binding of employees to the results of an election in which they have not had a voice in borne out by the answers to the questionnaire which, as aforesaid, were overwhelmingly against the Union. The Union did not and does not represent a majority of the employees.

We submit that the Board's Order must be set aside, being based upon an improper election and in view of which Petitioner cannot be held guilty of any unfair labor practices.

The Court of Appeals in holding that the Petitioner failed in its burden to establish that the action of the Board was not fair and just overlooks the fact that Petitioner has never been given an opportunity to present evidence that the eligibility date used for the run-off election was remote and arbitrary overlooks the fact that it has been nearly two years since the Board certified the Union, and that there is no showing that said Union is now the appropriate bargaining representative and overlooks the fact that the limited proffered proof by the Petitioner that the eligibility date was arbitrary

and remote has never been contradicted or denied by any statement or offer of proof on the part of the Union or of the Board; that the proof of the Petitioner is therefore uncontradicted that there were substantial changes in personnel in the Unit affected by the run-off election, that a substantial portion of the Unit employees were denied the right to express their wishes and were bound by the result of an election in which they were not given an opportunity to voice their choice. The showing is that Petitioner did sustain the burden of proof that the eligibility date set for the run-off election was remote and arbitrary and the certification must, therefore, be set aside and a new election with a proper eligibility date held.

CONCLUSION

It is respectfully submitted that this Petition for Certiorari to review the judgment of the Court of Appeals for the Fifth Circuit should be granted.

Respectfully submitted,

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APPENDIX

OPINION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

Filed June 22, 1956

In The
UNITED STATES COURT OF APPEALS
For the Fifth Circuit

No. 15830

CONE BROTHERS CONTRACTING COMPANY
Petitioner,

versus

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for Review of an Order of the National Labor Relations Board, sitting at Washington, D. C.

(June 22, 1956.)

Before RIVES, CAMERON and BROWN, Circuit Judges.

BROWN, Circuit Judge: In the Employer's petition for review of the findings[1] and Order[2] of the Board, the principal attack, deferred of necessity to this time, *Volney Felt Mills, Inc. v. LeBus*, 5 Cir., 196 F.2d 497, is on the validity of the election proceedings leading to Certification by the Board, July 27, 1954, of United Stone and Allied Products Workers of America, CIO, as the Exclusive Bargaining Representative of all of the employees in the unit concerned.

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1 The Examiner's conclusions in the Report [111 NLRB No. 62] approved by the Board in full were summarized: "By refusing to bargain with the Union on request, unilaterally raising the wages of some of the employees in said unit, stating that it will close its doors before signing a contract with said Union, refusing to furnish the Union, on request job classification and wage data relevant to negotiations of wage and working conditions for the employees concerning whether they are members of the Union, Respondent has engaged and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act."

2 The Board affirmed all of the rulings and adopted, "the findings, conclusions, and recommendations of the Trial Examiner" and ordered that the employer cease and desist from (a) refusing to bargain with the Union (b) refusing to furnish job classification, wage data, etc. (c) threatening to close its business (d) polling or interrogating its employees in such a manner as to interfere with, restrain, or coerce them in rights guaranteed by Section 7 of the Act (e) granting any wage increase or otherwise altering the terms or conditions of employment without prior notification and (f) "In any like or related manner interfering with, restraining or coercing its employees in the exercise of the right to self-organization, to form, join or assist, and bargain collectively through said Union * * *."

The Employer attacks the certification on the ground that the eligibility date (February 27) ought not to have been the same for the original and run-off election.[3] In support of this, it asserted, through proferred proof, that, by notable changes in personnel,[4] a substantial portion of the unit employees were denied the right to express their wishes and, as a corollary, the result might well have been different had they been allowed to vote. It was because of this that the Em-

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[3] The original election was held March 17, 1954, the run-off April 7, with these results:

	March 17 Election	April 7 Run-Off
United Stone and Allied Products Workers of America, CIO [referred to herein as "Union"]	129	196
No Union	129	140
International Union of Operating Engineers [called "Engineers"]	77	___
Ballotts challenged or voided	11	9
Totals	346	345

[4] The Employer proferred testimony that between February 27, the eligibility date, and March 27, the eligibility date which it urged the Board to fix for the run-off, 87 employees had left its employ and 99 were hired. Under the Examiner's ruling that, in the Complaint Proceedings, he was bound by the prior action of the Board, there was no evidence received on this or on the number of those out of the 99 "new" employees who were actually employed on March 27.

ployer took the private poll,[5] condemned as an unfair labor practice by specific finding of the Board, and which, it further claimed, demonstrated that the eligibility date, artificial and too remote, resulted in an election not truly reflecting the will of the employees.

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[5] By proper steps in the Representation Proceedings, the Employer raised all of the present objections to the election, but the Board, in a Supplemental Decision and Certification, July 27, 1954, (109 NLRB 483) unanimously certified the Union as the Exclusive Bargaining Representative stating that, "Material deviation from the rule set forth in Section 102.62 * * * is not warranted and would not be consistent with good administration of the Act. Between July 27 and the first bargaining session held August 12, the employees were requested to mark a ballot accompanying pay checks which read:

> " 'Do you belong to the United Stone and Allied Products Workers of America, CIO, Union?
> (Please answer by checking 'Yes' or 'No')
>
> [YES:] [NO:]
>
> " 'We are asking the above question simply to see whether the union represents a majority of you or not. Your truthful answer will be appreciated. It will make no difference whether you do or don't.' "

Of 470 "ballots", 64 answered "Yes" and 406 "No". Inarticulately drawn, as the Employer concedes, the significant word was *belong*, a matter which confused some employees whose applications for membership had not been finally processed, and which was, in any case, irrelevant to *representation*.

The assault is a frontal one for the Employer concedes—indeed, its complaint is founded on the fact—that in fixing the same eligibility date for both elections, the Board was following its formal rule,[6] reflecting, as it does, its long traditional practice.[7]

We think that the action of the Board in following its rule and practice under the circumstances of this case was eminently fair and just, and the Employer has failed in its burden to establish the contrary, *NLRB v. Huntsville Mfg. Co., 5 Cir.,* 203 F.2d 430, 433, 434; *NLRB v. Bar-Brook Mfg. Company, Inc.,* 5 Cir., 220 F.2d 832, 834. A single eligibility date, barring unique and pressing circumstances requiring a different rule, close in point of actual time to both elections is a reasonable and practicable adjustment in the election machinery to assure a free and just result by avoidance of the opportunity or temptation to manipulate the electorate through purposeful hirings or firings by either union or employer. Fixing eligibility at *some* time prior to the commencement of the vote in labor or political elections envisages that some individuals will be without a voice, but, "The

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[6] 29 CFR 102.62: "Employees who were eligibile to vote in the * * * [original] * * * election and who are employed in an eligible category on the date of the run-off election shall be eligible to vote in the run-off election."

[7] Apparently first used as a rule of decision in 1939 in *Aluminum Co. of America,* 13 NLRB 79, 81, the rule was formally promulgated as early as 1943 in Section 11(b), Art. III, NLRB Rules and Regulations, Series 3, effective November 16, 1943; and is, the Board states, applied even-handedly against labor unions (see *Standard Coil Products Co.,* 101 NLRB 261; *Reed Roller Bit Co.,* 61 NLRB 867) as well as against employers *(Jasper Wood Products Co.,* 75 NLRB 808) requesting a later eligibility date, while recognizing, of course, the necessity for a new eligibility date where, for some reason, the original election is vacated, e.g., for irregularity or misconduct, see *McMullen Leavens Company,* 83 NLRB 948, 955.

principal of majority rule * * * does not foreclose practical adjustments designed to protect the election machinery from the ever-present dangers of abuse and fraud", *NLRB v. A. J. Tower Co.*, 329 U.S. 324, 330, 331, 91 L.Ed. 322.

This reflects a common and necessary practice in political elections where residence or advance registration requirements frequently result in partial disenfranchisement and, by a closer analogy, primary nomination election[8] in which, as under this Act,[9] the run-off is a part of the original election and is but a further step[10] in that proceeding.

An original election within three weeks of the eligibility date, followed by a run-off three weeks later, with the eligibility date for both fixed by impartial application of the long-time rule was not arbitrary, unreasonable action by the Board to whom, "Congress entrusted * * * the control of the election proceedings and the determination of the steps necessary to control an election * *", *NLRB v. Huntsville Manufacturing Company, supra.*

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[8] The Board's rule is in harmony with the policy of Florida, the situs of the Employer, which closes registration books 30 days before the first primary and thus fixes eligibility for the run-off, held three weeks later, to those originally eligible, Florida Statutes Annotated, Election Code of 1951, Sections 97.031, 98.011, 98.051, 100.061, 100.091.

[9] Section 9(c)(3) provides in part: "In any election where none of the choices on the ballot receives a majority, a run-off shall be conducted, the ballot providing for a selection between the two choices receiving the largest and second largest number of valid votes cast in the election."

[10] See *Aluminum Co. of America*, supra; *Sears, Roebuck & Co.*, 48 NLRB 1170, 1173.

Since the Employer, deeming the certification invalid, delined altogether to bargain in good faith, this ultimate rejection by us of the claim of invalidity of the certification, automatically affirms the Board's basic finding of a violation and requires enforcement of the affirmative order to bargain.

The refusal to bargain was asserted in the genuine belief that the election was invalid, but, as we have held, this mistaken belief does not, cannot, excuse the Employer from the consequences of this basic violation of the Act. But we do not think that the bargaining procedure which must now commence should be encumbered, advantages or disadvantages be gained or suffered, by the lurking threat of contempt proceedings based on one or more of the specific, incidental, subsidiary, detailed provisions of the cease and desist order which have no real substantial support in the record. This is especially so because of the sweeping prohibition (Item (f) note 2, *supra*) against "like or related" interferences with employees' rights.

Several are extremely inconsequential and have a standing as a specific complaint only through extraordinary technicality: the refusal (Item (b) note 2) to furnish job classification, wage data, etc., was not an obdurate unwillingness to afford needed information to embarrass or retard the effectiveness of the bargaining process of the type condemned in *NLRB v. The Item Company,* 5 Cir., 220 F.2d 956; if it were ever declined as such, it was inferential only when, because of the basic complaint about certification, the Employer declined to bargain at all. The finding (Item (c) note 2) of threatening to close its business comes down to a single outburst by a vice president described by the

Examiner as "a declaration * * * made in a moment of deep emotional disturbance over an ultimatum he received from another union [the Engineers—the rival union which lost in the first election], that he would close the business before he would sign a contract * * *" and concerning which the Board later stated, "in these circumstances, it is a fair conclusion that neither Conrad nor Lynn [the only two employees who were ever shown to have heard this conversation] regarded * * * [the vice president's] statement as a threat; nor, if the incident had ended there, could it validly be said to have ended to restrain or coerce either them or any employee who might later have learned of the incident." The granting of wage increases (Item (e) note 2) was an unsolicited raise of ten cents per hour to all truck drivers of heavy equipment who had been in the Employer's employ for a year or more, given on August 28 during the period that the three bargaining sessions were being held. Attempting now to compress this into a situation like *NLRB v. Crompton-Highland Mills,* 337 U.S. 217, 93 L.Ed. 1320; *Armstrong Cork Mfg. Co. v. NLRB,* 5 Cir., 211 F.2d 843, the Report significantly stated, "the Examiner does not find that the raise was given with destruction of the Union's majority as its premeditated goal. It was granted to but a part of the group, who had not participated in an earlier raise * * *; those receiving it were persons of proven competence * * * [and] * * * While the wage raise thus overstepped the bounds of Section 8(a)(5) * * * the factors pointing to a business necessity for granting the raise puts the matter of actual motive in sufficient doubt for Respondent to be entitled to the benefits thereof."

Nor, on final analysis, do we think there is anything in the record which would support the finding that the poll (Item (d) note 2) was meant to, or did, have the effect of interfering with the employees' rights under the Act. While we adhere to the notion that an employer may lawfully discuss the subject of their union preferences with employees, see *NLRB v. T. A. McGahey et al,* 5 Cir., ...F.2d. . . . [No. 15691, February 27, 1956], we do not think that this is the case in which to determine when, or under what circumstances generally, a poll may be taken.[11]

Here the poll, voluntary and with no compulsion, was to resolve in the Employer's mind the doubt so deep concerning the validity of the election process as to lead it to take the forthright, albeit risky, course of declining to bargain as the means of testing its convictions. The

[11] Some cases appear to hold that a systematic inquiry is an invasion of the employee rights: NLRB v. Tehel Bottling Co., 8 Cir., 129 F.2d 250, 252-253; NLRB v. Colten, 6 Cir., 105 F.2d 179, 181-192; NLRB v. Burry Biscuit Corp., 7 Cir., 123 F.2d 540, 541-543; Titan Metal Mfg. Co. v. NLRB, 3 Cir., 106 F.2d 254, 260, cert. den. 308 U.S. 615; NLRB v. Somerville Buick, 1 Cir., 194 F.2d 56, 58.

Others recognize their ligitimate use; NLRB v. Russell Kingston, 6 Cir., 172 F.2d 771, 774; Katz Drug Co. v. NLRB, 8 Cir., 207 F.2d 168, 171-172; NLRB v. Protein Blenders, 8 Cir., 215 F.2d 749, 750; NLRB v. Roberts Bros. 9 Cir., 225 F.2d 58.

Board, while agreeing[12] with this, concluded, after an extended seventeen-page discussion, that the effect of the poll was either an attempt to repudiate the official election or so undermine the prestige, standing or integrity of the Bargaining Representatives as to embarrass the effectiveness of negotiations, that it was itself an unfair labor practice. But the unfair labor practice was not the taking, or the use of the results of, the poll which, as the Employer saw it, merely confirmed its contention (legal and factual) that the Board's election was invalid and did not reflect the true wishes of its employees. The unfair labor practice was the outright, final refusal to bargain under the genuine, though mistaken, idea that this was its legal right. This was a calculated risk which it took apparently with full consciousness of the consequences if it were wrong. But in doing this, the Employer anticipated, as came to pass, that the soundness of its claim of illegality would be determined in the inevitable (and present) Complaint Proceeding and not

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[12] The Board's Report states: "The Examiner is persuaded that Respondent's purpose in taking that poll was not to obtain disclosure of the affiliation of any individual employee, but for such reasons as seemed sufficient to it, Respondent wished to make a tally of its own concerning the unit as a whole. While, as the Examiner finds, the poll was not borne of any desire to obtain discovery of individual preferences or to punish any employee, still open and deferred to the conclusionary part of this report is the question of whether the poll, considering its occasion * * * impinged upon the rights guaranteed * * * in * * * the Act * * *."

The "conclusionary" part of the Report referred to above began with this basic finding: "The poll of the employees, as has already been found, was not resorted to for the purpose of either making discovery of the individual union preferences or affiliations of the employees or laying a basis of reprisal therefor."

by self-help which would be condemned, *Brooks v. NLRB,* 348 U.S. 96, 99 L.Ed. 125; *NLRB v. Sanson Hosiery Mills,* 3 Cir., 195 F.2d 350, cert. den. 344 U.S. 863, whether by the device of a private poll or otherwise.

The Board's Order is sustained insofar as it requires Petitioner, the Employer, to bargain collectively with United Stone and Allied Products Workers of America, CIO, as the duly certified exclusive Bargaining Representative of its employees in the certified unit, but enforcement as to the balance (Items (b) (c), (e) and (f) note 2) is denied, and the Employer's Petition, to that extent, is sustained.

ENFORCEMENT GRANTED IN PART AND DENIED IN PART.

A True Copy:

Teste:

JOHN A. FEEHAN, JR.

Clerk of the United States Court
of Appeals for the Fifth Circuit.

(SEAL)